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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 683

SAVON GAS STATIONS NUMBER SIX, INC.,
AND
A. & H. TRANSPORTATION, INC.,
Petitioners,

v.

SHELL OIL COMPANY,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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INDEX

Table of Contents

	PAGE
Opinions Below	1
Jurisdiction	2
Questions Presented	2
Statutes Involved	2-3
Statement of the Case	3-8
Reasons for Granting the Writ	8-13
1. Decision Rendered on Summary Judgment in Conflict with Supreme Court Decisions as to Right of Jury Trial	8-9
2. Decision in Conflict with Applicable Decisions of Supreme Court	9-11
3. Court of Appeals Opinion Decides Important Question of Federal Law Which Has Not Been Settled and Should Be Settled by the Supreme Court	12-13
Conclusion	13
Appendix A — Statutes Involved	1a-2a
Appendix B — Opinion of the United States Court of Appeals For The Fourth Circuit	3a-11a
Appendix C — Opinion of the United States District Court for the District of Maryland	12a-22a

Table of Citations

Cases

American Federation of Tobacco Growers v. Neal, et al., 183 F. 2d 869 (4 Cir. 1950)	11
Continental Ore Company v. Union Carbide and Carbon Corporation, 370 U.S. 690, 82 S. Ct. 1404, 8 L. Ed. 2d 777 (1962)	8

PAGE

Gamco, Inc. v. Providence Fruit & Produce Bldg., Inc., 194 F. 2d 484 (1 Cir. 1952) 11

Moore v. Mead's Fine Bread Co., 348 U.S. 115, 75 S. Ct. 148, 99 L. Ed. 145 (1954) 10

Northern Pacific R. Co. v. United States, 356 U.S. 1, 6, 78 S. Ct. 514, 518, 2 L. Ed. 2d 545 (1958) 11

Poller v. Columbia Broadcasting System, Inc., 368 U.S. 464, 473, 82 S. Ct. 486, 491, 7 L. Ed. 2d 458 (1962) 8, 9, 10

Standard Oil Co. of California v. United States, 337 U.S. 293, 305-306, 69 S. Ct. 1051, 1058, 93 L. Ed. 1371 (1949) 11

United States v. Diebold, Inc., 369 U.S. 654, 655, 82 S. Ct. 993, 8 L. Ed. 2d 176 (1962) 8

United States v. Loews, Inc., 83 S. Ct. 97, 106 (1962) 10, 11

United States v. Paramount Pictures, 334 U.S. 131, 159, 68 S. Ct. 915, 930, 92 L. Ed. 1260 (1948) 10

United States v. Socony-Vacuum Oil Co., Inc., 310 U.S. 150, 60 S. Ct. 811, 84 L. Ed. 1129 (1940) 10

Books and Treatises

Sweet, Morris L, "Tenant-Selection Policies of Regional Shopping Centers", The Journal of Marketing, April, 1959 12-13

Wingate and Corbin, Changing Patterns in Retailing (Richard D. Irwin, Inc., 1956) 12

Statutes and Rules

United States Code:

15 U.S.C.—

Section 1 3

Section 2 3

Section 15 2-3, 8

Miscellaneous

PAGE

Hearings, United States Senate Subcommittee of the Select Committee on Small Business (Eighty-Sixth Congress, First Session, April 28 and 29, 1959) 12, 13

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SHELL OIL COMPANY,
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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Savon Gas Stations Number Six, Inc., and A. & H. Transportation, Inc., Petitioners, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit entered in this cause on September 24, 1962.

OPINIONS BELOW

The opinion of the United States District Court for the District of Maryland is reported at 203 F. Supp. 529 (D. Md. 1962) and is reprinted herein as Appendix C, *infra*, pp. 12a-22a, inclusive. The opinion of the United States Court of Appeals for the Fourth Circuit (R. 2) is reported at 309 F. 2d 306 (4 Cir. 1962) and is reprinted herein as Appendix B, *infra*, pp. 3a-11a, inclusive.

JURISDICTION

The judgment of the United States Court of Appeals for the Fourth Circuit which is here sought to be reviewed was dated and entered on September 24, 1962 (R. 14). The jurisdiction of this Court is invoked under U.S. Code, Title 28, Section 1254(1).

QUESTIONS PRESENTED

1. Assuming that defendant Shell's exclusive covenant in its shopping center lease is "legal," do the plaintiffs, as neighboring competitors, have a remedy against Shell under the Sherman Act, when Shell uses the covenant as a device to injure plaintiffs, to prevent them from engaging in price competition, and to perpetuate Shell's existing price fixing conspiracy?

2. Is Shell's enforcement of its exclusive covenant a violation of the Sherman Act, when the covenant was acquired initially by Shell because of its substantial economic power and when the covenant, together with other similar devices used by Shell, appreciably restrains competition in the securing of prime gasoline station sites and thereby prevents the small, independent competitor from gaining access to the consuming public?

3. Do plaintiffs have a remedy against defendant Shell under the Sherman Antitrust Act for damages caused by Shell's enforcement of an exclusive covenant in a shopping center lease, when the covenant is one of many similar restrictive covenants which Shell and its co-conspirators use to restrain trade and to gain a monopoly in prime gasoline station sites?

STATUTES INVOLVED

The statutes involved in this case are Section 4 of the Act of Congress of October 15, 1914, C. 323, 38 Stat. 731, as amended, commonly known as the Clayton Act (15 U.S.C.

Sec. 15), which section provides for the recovery of damages for the violation of Sections 1 and 2 of the Sherman Antitrust Act (15 U.S.C. Secs. 1 and 2). These statutes are printed in Appendix A, *infra*, pp. 1a-2a, inclusive.

STATEMENT OF THE CASE

This case is a treble damage action based on alleged violations of the restraint of trade and monopoly sections of the Sherman Law. The issue is whether the case was rightly terminated by a summary judgment of dismissal.

Petitioners, plaintiffs below, are two affiliated corporations engaged in the business of buying and transporting refined petroleum products and selling them at retail through eight gasoline service stations in the Baltimore, Maryland area. Petitioners' operations require them to import substantial products from out of state and to maintain bulk storage facilities, tank wagons and delivery equipment. The eight service stations trade under the name Savon Gas and are regarded in the trade as "independents," that is, large multi-island stations selling "off-brand" gasoline at thrift prices, in competition with the stations of the major oil marketing and producing companies (known as "the majors"). Petitioners' stations engage in stiff price competition with the majors. The price of Savon Gas is normally approximately two cents a gallon lower than the prevailing prices charged by the majors.

Respondent, Shell Oil Company (referred to herein as "Shell") is engaged in the production and marketing of petroleum products on an international scale and also in the retail sale of such products in filling stations in the United States, either directly or through its lessee-dealers.

The trial court dismissed the section of plaintiffs' complaint (Count I) which sets forth the alleged violations of

the Sherman Antitrust Act, not on the ground that these allegations fail to assert causes answerable under the antitrust laws, but rather on the ground that the court does not have jurisdiction of these causes, because nowhere in the sum of the facts presented is interstate commerce involved.

Accordingly, on appeal, the sole question which Petitioners raised pertaining to the antitrust violations was whether any aspect of interstate commerce or substantial effect upon interstate commerce was present. Similarly Shell argued on appeal that the dismissal of the antitrust action was proper because the undisputed facts did not disclose interstate commerce.

However the Court of Appeals affirmed the lower court's dismissal on an entirely different ground. Passing the question of jurisdiction and interstate commerce, the appellate court stated that "plaintiffs' case is pitched upon the theory that * * * the Federal Anti-Trust Statutes * * * are violated when the owner of a modern shopping center enters into a restrictive agreement with a lessee giving him the exclusive right to sell his wares in the area" (Appendix B, *infra*, p. 7a). In dismissing plaintiffs' antitrust suit, the court held as follows:

> "We do not think that the restriction imposed upon the defendant by the exercise of the right of the Shopping Center to choose the persons who are allowed to do business on its property amounted to an unreasonable restraint of trade within the purview of the Federal Statutes" (Appendix B, *infra*, p. 10a).

Thus, plaintiffs' antitrust count was dismissed because, in the view of the Court of Appeals, the complaint did not state a cause of action.

It is Petitioners' fundamental contention that the Court of Appeals was in error in its summary of plaintiffs' case.

The gist of plaintiffs' antitrust action is not that an exclusive leasing arrangement in a shopping center is an unreasonable restraint of trade, *per se*, and accordingly a violation of the antitrust laws. Rather, plaintiffs' case is based on three separate premises: First, that an exclusive leasing arrangement, even if reasonable and therefore "legal," cannot be used as a guise to prevent price competition and to perpetuate a price fixing conspiracy; second, that the particular covenant in this action is illegal, because the covenant was obtained initially as a result of Shell's substantial economic power and, together with other similar devices employed by Shell across the nation, appreciably restrains competition in the securing of prime gasoline station sites; and third, that the particular exclusive covenant in this case is part and parcel of Shell's nationwide agreements with its own dealers, with other major oil companies and with shopping center developers throughout the United States to exclude independent (non-major) retailers from prime gasoline station sites located in urban shopping centers and thus is one of many restrictive covenants which the defendant and its co-conspirators use to exclude competition and to attempt to control a market and gain a monopoly.

The facts upon which the plaintiffs rely are set forth primarily in their complaint. To some extent these facts are further developed in the two depositions and one affidavit filed in the case. However the lower court dismissed the antitrust action, for lack of jurisdiction, soon after the complaint was filed and at a point when few discovery proceedings had been conducted. Plaintiffs' facts are as follows: One of the plaintiffs' service stations is located on Eastern Boulevard, in Baltimore County, Maryland, immediately adjacent to but not within the Middlesex Shopping Center (Middlesex); this station was opened on Au-

gust 31, 1956. Prior thereto, on October 13, 1954, the defendant Shell leased a tract within the shopping center. Shell constructed a service station on this site and subleased it to a Shell operator or dealer who opened for business in 1954. In its lease with Middlesex, Shell is accorded an exclusive covenant to conduct the only gasoline service station in the center.

The Savon station, while not within the shopping center, was designed and constructed to receive traffic not only from Eastern Boulevard, but also to accommodate the movement of traffic to and from the parking areas of the shopping center, on the basis of an agreement with the Middlesex owners which permitted this free flow of traffic. As a result, beginning on the first day of the operation of the Savon station, a substantial number of its patrons moved to and from the shopping center to trade.

In large part because of petitioners' vigorous price competition the new Savon station adjacent to Middlesex was an instantaneous success and a source of immediate concern to its competitor, Shell. In order to thwart this price competition, in order to shut off from the Savon station and retain for itself the substantial amount of trade moving between the station and the shopping center, and in order to be able to continue to dictate and fix the higher retail prices charged by its independent Shell dealer in the center, the defendant launched a scheme to damage the plaintiffs. Under the guise of the restrictive covenant in its lease with Middlesex, Shell caused a series of barriers or curbings to be constructed between the Savon station and the shopping center. As soon as the first barriers were erected, Savon's business dropped precipitously and the station has been operating at a loss ever since. These losses have injured the overall operation of the Savon

chain and its ability to expand and prosper as an independent jobber and marketer of petroleum products.

Despite the reference, in the opinion of the Court of Appeals, to no interference with plaintiffs' sales and no restraint upon the competitive sale of gasoline in the neighborhood (Appendix B, *infra*, p. 9a), plaintiffs claim the barriers resulted in losses of $20,000. per year in earnings, $150,000. per year in sales and 600,000 gallons per year at its Eastern Boulevard-Middlesex station alone, and as much as $500,000. in gross sales for the overall Savon chain.

Plaintiffs' allegations to the effect that Shell, a substantial economic power, is engaged in nationwide conduct and agreements with others to exclude the independent, unbranded gasoline marketer from prime urban shopping center locations are set forth in general rather than specific terms in the complaint (Appellants' Appendix below, App. 9, paragraphs 21 and 22). These allegations were amplified in argument before the trial court and the Court of Appeals. Further, in the deposition of Shell division manager, Eustis, he admitted that Shell adhered to a policy across the nation of insisting upon restrictive covenants, such as the one in its lease with Middlesex, in order to exclude competition, and that in doing so, Shell followed the course of action of the other majors (Appendix B, *infra*, p. 6a; Appellants' Appendix below, App. 16-17, 25-31). The interrogatories served on the defendant were aimed to enlarge this proof and to lay groundwork for further discovery.

The Shell division manager also admitted that Shell fixes the prices at which the dealer at its Middlesex station sells gasoline and that these prices are established by requiring the dealer to follow the pattern of pricing of the other major oil companies (Appellants' Appendix below, App. 24).

The restraints imposed upon petitioners by Shell accomplished the purposes for which they were designed, namely, to enable Shell to thwart the price competition offered by the Savon station and to substantially reduce the station's sales. As Mr. Eustis told plaintiffs' president, he had no intention of spotting Savon two cents a gallon in the same neighborhood (Appellants' Appendix below, App. 46). As a result of this restraint, the Savon station has been unable to compete effectively with Shell, and particularly, to obtain a volume of sales commensurate with its price scale. The barriers have eliminated the price competition which existed between Shell and the plaintiffs prior to the launching of the conspiracy and have enabled Shell to fix the prices at its Middlesex station with impunity.

Basis for Federal Jurisdiction

The District Court had jurisdiction of plaintiffs' antitrust causes by virtue of 15 U.S.C. Sec. 15 (Appendix A, *infra*, p. 2a).

REASONS FOR GRANTING THE WRIT

1. *Decision Rendered on Summary Judgment in Conflict with Supreme Court Decisions as to Right of Jury Trial.*

The decision below should be reviewed because it erroneously decides, by a summary judgment of dismissal, genuine issues as to material facts which are questions only the jury can determine. In taking from the jury the factual disputes which are at the heart of this case, the decision below is in conflict with many opinions of this Court. *United States v. Diebold, Inc.*, 369 U.S. 654, 655, 82 S. Ct. 993, 8 L. Ed. 2d 176 (1962); *Poller v. Columbia Broadcasting System, Inc.*, 368 U.S. 464, 473, 82 S. Ct. 486, 491, 7 L. Ed. 2d 458 (1962); Cf. *Continental Ore Company v. Union Carbide and Carbon Corporation*, 370 U.S. 690, 82 S. Ct. 1404, 8 L. Ed. 2d 777 (1962).

The crucial issues for the jury are the following: Did Shell insist that the exclusive covenant be enforced, by the erection of the barriers, as a device to lessen price competition and to perpetuate Shell's existing price fixing conspiracy with its dealer? Did Shell obtain the restrictive covenant in the lease initially because of its substantial economic power, and if so, was enforcement of the covenant part of Shell's nationwide conduct to unreasonably restrain the independent gasoline station operator from securing the benefits of prime service station sites? Was Shell's enforcement of the covenant one act in Shell's conspiracy with others to gain a monopoly in these prime sites? In all of these questions of fact, the motive and intent of the defendant is the central issue. This Court has held that in such cases summary procedures should be used sparingly. *Poller v. Columbia Broadcasting System, Inc., supra.*

2. *Decision in Conflict with Applicable Decisions of Supreme Court.*

If we look at the record here in the light most favorable to petitioners and thereby assume that the jury will answer any one or all of the foregoing three questions in the affirmative, the decision of the appellate court conflicts, as a matter of law, with many decisions of this Court.

The Court of Appeals concluded that the restrictive covenant was not, in and of itself, an unreasonable restraint. But the court did not consider plaintiffs' allegations as to the illegal purposes for which Shell was putting the covenant. On the contrary, the court held that there was no price fixing conspiracy, no interference with plaintiffs' business and no restraint on sales, despite the direct allegations to the contrary (Appendix B, *infra*, p. 9a).

A motion picture distributor has a legal right to offer a group of films in block to its customers, be they movie theatres or television stations, but not if the distributor's motive is to force its customers to buy the entire package of films, or for that matter, more than one of the films, when the customer may prefer to select only one. *United States v. Paramount Pictures*, 334 U.S. 131, 159, 68 S. Ct. 915, 930, 92 L. Ed. 1260 (1948). *United States v. Loews, Inc.*, 83 S. Ct. 97, 106 (1962). The act of cancelling a network affiliation contract, pursuant to the terms of the contract, appears perfectly legal on its face, but nevertheless may be in violation of the antitrust laws if the jury finds the cancellation to be part of a conspiracy to eliminate a competitor. *Poller v. Columbia Broadcasting System, Inc., supra.* Similarly, the enforcement by Shell of the covenant here violates the antitrust statutes when the motive is to lessen plaintiffs' price competition at the neighboring station and to permit Shell to continue its price fixing conspiracy with its dealer. *United States v. Socony-Vacuum Oil Co., Inc.*, 310 U.S. 150, 60 S. Ct. 811, 84 L. Ed. 1129 (1940); *Moore v. Mead's Fine Bread Co.*, 348 U.S. 115, 75 S. Ct. 148, 99 L. Ed. 145 (1954).

Secondly, the appellate court did not consider plaintiffs' contention that the Middlesex covenant was only one of many similar "exclusives" acquired by Shell, as a result of its economic power, and employed across the nation to appreciably restrain free competition in obtaining desirable service station locations. On its face, the covenant is an exclusive dealing arrangement; or perhaps more accurately, a tying arrangement, in that the shopping center owner, in exchange for Shell's agreement to take space in his center, agrees to exclude Shell's competitors from the center. The "tied product" is the additional space in the center which the owner might have leased to Shell's

competitors. Just as in the classic cases of exclusive dealing and tying arrangements, the restrictive covenant serves hardly any purpose beyond the suppression of competition. *Standard Oil Co. of California v. United States*, 337 U.S. 293, 305-306, 69 S. Ct. 1051, 1058, 93 L. Ed. 1371 (1949). Indeed, the shopping center owner gains no benefit from the arrangement. As Solomon Kaplan, attorney for the Middlesex center, testified before the House of Representatives' Executive Committee pertaining to this case (stipulated to be a part of the record here): Shopping center operators and developers "try to avoid granting any type of exclusives * * * and if we have to grant exclusives, we do so reluctantly" (Transcript of Proceedings before Judge Winter of February 2, 1962, pp. 67-68). Such exclusive arrangements are proper objects of antitrust concern, where as here, they may destroy the ability of the small, independent gasoline station operator to secure locations which will afford him access to the consuming public. *United States v. Loews, Inc., supra; Northern Pacific R. Co. v. United States*, 356 U.S. 1, 6, 78 S. Ct. 514, 518, 2 L. Ed. 2d 545 (1958).

Finally, the appellate court failed to consider plaintiffs' allegation that the covenant is one of many similar agreements employed by Shell and other major oil companies, in concert, to exclude independent gasoline retailers from prime gasoline station locations. Such exclusion is a *per se* violation of the antitrust laws. *Gamco, Inc. v. Providence Fruit & Produce Bldg., Inc.*, 194 F. 2d 484 (1 Cir. 1952); *American Federation of Tobacco Growers v. Neal, et al.*, 183 F. 2d 869 (4 Cir. 1950).

3. *Court of Appeals Opinion Decides Important Question of Federal Law Which Has Not Been Settled and Should Be Settled by the Supreme Court.*

The Court of Appeals' decision deals with an important question of Federal law which has not been directly considered by this Court, that is, whether the antitrust laws may be violated when the owner of a modern shopping center enters into a restrictive agreement with a lessee giving the lessee exclusive rights to sell his wares in the center.

The post war rise of suburbia and the automobile economy has made the shopping center the "first run" of the retail trade. *Wingate and Corbin, Changing Patterns In Retailing* (Richard D. Irwin, Inc. 1956) at p. 167 et seq. *Hearings, United States Senate Subcommittee of the Select Committee on Small Business* (86th Congress, First Session, April 28 and 29, 1959) "Alleged Discriminatory Practices Against Small-Business Concerns in Suburban Shopping Centers."

Because of the requirements of financing and mortgage lenders, the large chains have become the kingpins of the shopping center. They are able to dictate the terms upon which the shopping center is developed. *Hearings, supra*, p. 6. These concerns habitually abuse their power by obtaining discriminatory advantages over small business. For example, a shopping center operator is forced to grant the chain a very low rent and in consequence to charge a high rent to the independent retailer. *Hearings, supra*, p. 24, 57.

The restrictive covenant of the type here under attack is another of the vehicles by which the powerful marketing organizations are able to drive the independent business man out of the "first run" retail locations. Sweet, Morris L.,

"Tenant-Selection Policies Of Regional Shopping Centers", *The Journal of Marketing*, April, 1959; *Hearings*, *supra*, p. 179.

In petitioners' view, free competition in the market place is endangered by the holding below that the Shell covenant is not, as a matter of law, an unreasonable restraint of trade.

CONCLUSION

For the foregoing reasons we urge this Court to grant the writ of certiorari requested by the petitioners.

Respectfully submitted,

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APPENDIX A

STATUTES INVOLVED

United States Code, Title 15, Sections 1, 2 and 15:

Section 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal: *Provided*, That nothing herein contained shall render illegal, contracts or agreements prescribing minimum prices for the resale of a commodity which bears, or the label or container of which bears, the trade mark, brand, or name of the producer or distributor of such commodity and which is in free and open competition with commodities of the same general class produced or distributed by others, when contracts or agreements of that description are lawful as applied to intrastate transactions, under any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia in which such resale is to be made, or to which the commodity is to be transported for such resale, and the making of such contracts or agreements shall not be an unfair method of competition under section 5, as amended and supplemented, of the Act entitled "An Act to create a Federal Trade Commission, to define its powers and duties, and for other purposes," approved September 26, 1914; *Provided further*, That the preceding proviso shall not make lawful any contract or agreement, providing for the establishment or maintenance of minimum resale prices on any commodity herein involved, between manufacturers, or between producers, or between wholesalers, or between brokers, or between factors, or between retailers, or between persons, firms, or corporations in competition with each other. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court. [July 2,

1890, Chap. 647, Sec. 1, 26 Stat. 209; August 17, 1937, Chap. 690, Title VIII, 50 Stat. 693; July 7, 1955, Chap. 281, 69 Stat. 282; 15 U.S. Code, Sec. 1.]

Section 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court. [July 2, 1890, Chap. 647, Sec. 2, 26 Stat. 209; July 7, 1955, Chap. 281, 69 Stat. 282; 15 U.S. Code, Sec. 2.]

* * * * * * *

Section 15. That any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee. [October 15, 1914, Chap. 323, Sec. 4, 38 Stat. 731; 15 U.S. Code, Sec. 15.]

APPENDIX B

OPINION OF THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 8626.

SAVON GAS STATIONS NUMBER SIX, INC.,
AND A. & H. TRANSPORTATION, INC.,
Appellants,

versus

SHELL OIL COMPANY,
Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND, AT BALTIMORE.
HARRISON L. WINTER, DISTRICT JUDGE.

(Argued May 29, 1962. Decided September 24, 1962.)

Before SOPER, HAYNSWORTH and BRYAN, Circuit Judges.

Lawrence I. Weisman and David M. Blum (Nyburg, Goldman & Walter on brief) for Appellants, and William Simon (John Bodner, Jr.; S. R. Vandivort, and Howrey, Simon, Baker & Murchison on brief) for Appellee.

SOPER, Circuit Judge:

This suit was brought by two affiliated Maryland corporations, Savon Gas Stations No. 6, Inc., and A. and H. Transportation, Inc., which are engaged in the business

of buying and transporting refined petroleum products and selling them at retail at filling stations in the Baltimore area. The defendant is the Shell Oil Company, a Delaware corporation, which is engaged in the production and marketing of petroleum products on an international scale, and also in the retail sale of such products in filling stations in Baltimore.

The gist of the complaint is that Shell on October 13, 1954, in the course of its business entered into an illegal contract in unreasonable restraint of trade with the owners of Middlesex Shopping Center, one of the larger retail shopping centers in the Baltimore area. The Shopping Center is situated on a triangular tract of land in Baltimore bounded by Eastern Boulevard, Essex Avenue and Marlyn Avenue. Under the agreement Middlesex erected a filling station for Shell on property owned by it fronting on the Boulevard, adjacent to the Shopping Center, and leased it to Shell under a covenant that during the term of the lease Middlesex would not use or permit the use of its other property in the triangular area for the purpose of a gas station which would compete with the business being conducted by Shell on the leased premises.

It is charged that the plaintiffs were injured through the enforcement of this covenant two years later when, on August 31, 1956, they opened a filling station on property owned by them fronting on the Boulevard adjacent to the Shopping Center on the side opposite to the Shell Station, and engaged in the sale of gasoline at prices lower than those charged by Shell. The Savon Station was so constructed as to receive traffic from the Boulevard and also to permit the flow of traffic between the rear of the station and the parking area of the Shopping Center without using the street; and the owners of the respective properties entered into an agreement to avail themselves of this situation. Under this agreement the customers of the Shopping Center could cross the station to gain access to the street and the customers of the station could have direct access to the parking area of the Shopping Center. This arrangement increased the sales at the Savon Station but

it was terminated when Shell invoked the restrictive covenant in its earlier agreement of lease and induced Middlesex to abandon its agreement with Savon and to erect barriers between the Savon Station and the Shopping Center so as to prevent the free passage of vehicles between the two areas. Savon claims that by reason of this action its sales dropped off substantially and caused the losses for which it seeks damages in this suit.

The specific charge of illegality is made in the first count of the complaint that the lease agreement between Middlesex and Shell constituted an unreasonable restraint of trade in violation of §§ 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1 and 2. Section 1 provides in effect that every contract or conspiracy in restraint of trade or commerce among the several states or with foreign nations is illegal. Section 2 provides that every person who shall monopolize or conspire with any other person to monopolize any part of such trade or commerce shall be guilty of a misdemeanor and be punished by a fine not exceeding $50,000, or imprisonment not exceeding one year, or both.

The second count of the complaint charges that the wrongful and unlawful acts of the defendant, Shell, constitute not only a violation of the anti-trust laws but also an interference with the contractual rights of the plaintiff in violation of the common law of the state of Maryland.

The case was submitted to the District Judge on motion of the defendant for summary judgment or dismissal upon the allegations contained in the complaint and in certain depositions and affidavits of the parties. Finding the facts to be undisputed, he entered judgment for the defendant and dismissed the complaint. He was of the opinion that the restraint of trade involved in enforcement of the covenant in the lease did not occur in interstate commerce and had no substantial effect upon such commerce as asserted in the first paragraph of the complaint; and he also held that the restrictive covenant in the lease was not in violation of the common law of Maryland as alleged in the second count of the complaint.

The undisputed facts bearing upon the business activities of the parties which are set forth in the allegations of the complaint or in the depositions and affidavits considered by the court, are shown in the following recital.

Shell is engaged in interstate commerce on a national and international scale, producing, refining and marketing petroleum products. In the instant case it secured from Middlesex a lease on the gas station adjacent to the Shopping Center under which all other dealers in petroleum products were excluded from other property in the area owned by Middlesex. It pursues this policy elsewhere.

Savon Gas Stations No. 6, Inc., and A. and H. Transportation, Inc., the plaintiff corporations, may be considered as a single unit for our purposes since they are under a common ownership and have the same president. They are engaged in the business of buying and selling petroleum products. The goods are bought for the most part from the Arrow Oil Company, an affiliated corporation with the same president, which buys the goods in Maryland from producers or dealers who in turn import the goods from outside the state. Some of the goods are bought directly from out-of-state producers. The plaintiffs own and operate 8 service stations, 6 in Baltimore and 2 in the counties of Maryland. These stations make annual sales of 6,000,000 gallons amounting to $1,500,000. The Savon Station, which the plaintiffs operate adjacent to the Shopping Center has annual sales of 300,000 gallons amounting to $75,000 per year, a monthly average of 25,000 gallons at $6,250. At the commencement of business, the station's sales averaged 29,000-30,000 gallons per month, but after the barrier was erected and direct access to the parking area of the Shopping Center was denied sales dropped to 15,000-20,000 gallons per month. In each of the five years preceding the trial of the case the station lost approximately $20,000. All of the other stations with the exception of 2 are operated at a profit. In Maryland there are in all from 2500 to 2700 service stations selling between seventy and ninety million gallons of gasoline per month.

The plaintiffs' depositions show that the competitive area for the sale of petroleum products in the neighborhood

of the Shopping Center is included in a radius of three blocks from the Center. Within this area there are at least ten service stations in which virtually all of the well-known gasoline brands, including Esso, Socony, Mobil, Tidewater, Texaco, Sun, Crown, Atlantic, Sinclair, as well as Shell and Savon, are sold.

The plaintiffs' case is pitched upon the theory that both the Federal Anti-Trust Statutes and the common law of Maryland are violated when the owner of a modern shopping center enters into a restrictive agreement with a lessee giving him the exclusive right to sell his wares in the area. It is well known that the success of a shopping center depends upon the gathering together in one area of a variety of enterprises which are able to serve the needs of the general public and that this end can often be best accomplished by offering to the individual merchant the exclusive right to sell in the center the kind of merchandise he handles.* It is said, however, that such an arrangement is illegal and that the owner must be free to let any competitor in so that he can do business with the members of the public who are attracted to the area by the establishment of the center through the joint efforts of the owner and the merchants. The argument does not go so far as to maintain that the owner of the property may not of his own volition select the merchants he desires to associate with and exclude those he deems undesirable to the group. Such an argument would be clearly untenable since the right to select one's business associates is not denied by law. *United States v. Colgate & Co.*, 250 U.S. 300, 307; *United States v. Parke, Davis & Co.*, 362 U.S. 29, 43. Nevertheless, it is said that if substantially the same arrangement is made by a restrictive agreement between the owner and the merchant there arises a conspiracy to impose an unreasonable restraint of trade in violation of the Sherman Anti-Trust Act and a restraint of trade con-

* See Tenant Selection Policies of Regional Shopping Centers, Journal of Marketing, April, 1959; Senate Subcommittee of Committee on Small Business, 86 Congr., First Session, April 28-29, 1959; pp. 2-17, 56-67, 71-84; 34 N.Y.U. L. Rev. 940 (1959); 63 Harv. L. Rev. 1400 (1950).

demned by the ancient theory of the common law, which influenced the framers of the Anti-Trust Acts.

We agree with the conclusion of the District Judge that the restrictive covenant did not involve the violation of the Federal Statute. It has been established from the beginning that the condemnation of the Sherman Anti-Trust Act is directed only at such agreements or conspiracies as impose unreasonable or undue restraint upon interstate commerce. *Standard Oil Co. v. United States*, 221 U.S. 1; *United States v. Trenton Potteries*, 273 U.S. 392, 395-396; *Klor's v. Broadway-Hale Stores*, 359 U.S. 207, 211. In the instant case the restraint cannot be so characterized. The contrast between it and the agreements found to be illegal in the decisions upon which the plaintiffs rest their case demonstrates this conclusion. Since the sale of petroleum products at retail at service stations, considered as an isolated transaction, is local and intrastate in character, the plaintiffs have called our attention to authorities in which it is held that transactions in themselves local and intrastate may be within the purview of the statute if they spring from agreements whose enforcement reaches beyond the state. See *Klor's v. Broadway-Hale Stores*, 359 U.S. 207, 211; *Moore v. Mead's Fine Bread Co.*, 348 U.S. 115; *Mandeville Island Farms, Inc. v. American Crystal Sugar Co.*, 334 U.S. 219; *Osborne v. Sinclair Refining Co.*, 4 Cir., 286 F. 2d 832; *American Federation of Tobacco Growers v. Neal*, 4 Cir., 183 F. 2d 869.

In each of these cases, however, the agreements were obviously designed so to restrict and injure a merchant's business as to be easily recognized as unreasonable and oppressive. In *Klor's* a combination was entered into between the owner of a chain of department stores and ten manufacturers and distributors of household applicances in interstate commerce in order to deprive the owner of a local household appliance store of the goods he needed in his business by refusing to sell to him; and it was held that this arrangement amounted to group boycott in violation of §§ 1 and 2 of the Sherman Act, although the needs of the public could be supplied by other retail stores in the plaintiff's neighborhood.

In *Moore v. Mead* it was held that § 2 of the Clayton Act and § 3 of the Robinson-Patman Act were violated by a combination of manufacturers of bread, engaged in interstate commerce, who conspired to cut prices in one city, where the plaintiff had an intrastate bakery business, but maintained their prices elsewhere in interstate transactions.

In *Mandeville* it was held that the Sherman Anti-Trust Act was violated by a combination of corporations, who were beet sugar refiners and distributors in interstate commerce, who undertook to fix prices to be paid to intrastate growers of sugar beets.

In *American Federation of Tobacco Growers* we held that the statute was violated by a combination of tobacco warehousemen whereby a tobacco farmers' cooperative was excluded from the privilege of making sales on the local tobacco market.

In *Osborne* we held that the Sherman Act was violated when a producer of petroleum products entered into a tie-in arrangement with operators of local service stations whereby they were enabled to purchase petroleum products of the defendant only on condition that they buy accessories from a certain manufacturer.

It is quite obvious that no such meretricious agreement or arrangement was effected by the restrictive covenant in the lease in the pending case. There was no combination to fix prices; no effort to deprive the plaintiff of the necessary supplies for the operation of his business, no interference with his sales of goods to the public, no direct interference with his business in any fashion, and no restraint upon the competitive sale of gasoline in the neighborhood. The single restriction was to deny him direct access from the rear of his property to the parking area of the Shopping Center or, in other words, the right to use the property of the Shopping Center as part of his place of business. The customers of the Shopping Center had free access to the defendant's place of business by using

the public street in common with all other members of the traveling public. We do not think that the restriction imposed upon the defendant by the exercise of the right of the Shopping Center to choose the persons who were allowed to do business on its property amounted to an unreasonable restraint of trade within the purview of the Federal Statutes.

We agree also with the District Judge that the restrictive covenant did not violate the common law for the reasons set forth in his opinion. *Savon Gas Stations No. 6, Inc. v. Shell Oil Co.*, 203 F. Supp. 529. Most pertinent is the decision of the Court of Appeals of Maryland in *Maryland Trust Co. v. Tulip Realty Co.*, 220 Md. 399, where the validity of a restrictive agreement for the use of the parking area of a shopping center was upheld. The owner of the center had conveyed a part of the property by deed in which it covenanted that the grantee should have the right in common with other tenants in the shopping center to use the parking area for the benefit of itself and its patrons for ingress and egress and for parking motor vehicles. Subsequently, the stockholders of the grantor formed a new corporation which acquired a tract of land bordering on the parking area of the center, erected a store thereon and leased it to a new tenant with an agreement in which the owner of the shopping center joined to keep the boundary line between the new store and the parking area unobstructed. Upon suit for relief by the grantee in the first mentioned deed it was held that the covenant in the lease to the tenant of the adjoining property was in conflict with the agreement in the deed whereby the tenants of the shopping center acquired the right to use its parking area as described above; and it was further held that the chancellor was correct in requiring the erection of a fence between the parking area and the new store so that the tenant of the new store could not have the use of the parking area. The decision of the Court of Appeals was in harmony with the Maryland rule set out in the cases cited by the District Judge that partial restraints of trade, reasonably limited in time and space, are not in conflict with the common law.

In the *Tulip* case the Court of Appeals of Maryland expressly applied the rule that restrictive covenants should be strictly construed but, nevertheless, held that the grant to the tenants of the shopping center of the right to use the parking area for the benefit of itself and its patrons should be interpreted as exclusive so as to forbid the use of the parking area by other persons. In the pending case the plaintiff suggests that under the rule of strict construction the restrictive covenant in the deed from Middlesex to Shell should not be interpreted to require Middlesex to deny to Savon direct access to the parking area from the rear of its gas station but merely to forbid Middlesex to permit any person other than Shell the use of the property for the purpose of a competing gas station, and it is said that Savon did not propose to make such use of the parking area in this case. There is no substance in the suggestion. Savon sought an easement of access over the parking area so that it became in effect an extension of the area of the service station itself. The reasons which led the Court of Appeals of Maryland to interpret the covenant in the *Tulip* case as conferring exclusive use upon the grantee, and denying it to other persons, are equally applicable here.

Affirmed.

APPENDIX C

Opinion of the United States District Court for the District of Maryland

(Filed March 14, 1962)

Lawrence I. Weisman and David M. Blum, Attorneys for Plaintiffs.

William Simon and James T. Reilly, Attorneys for Defendant.

Winter, District Judge:

Defendant has moved for summary judgment upon the two count complaint filed against it to recover treble damages under Section 4 of the Clayton Act, 15 U.S.C.A. §15, for violation of Sections 1 and 2 of the Sherman Act, 15 U.S.C.A. §§1 and 2, and to recover damages and obtain injunctive relief under Maryland common law.

The dispute between the parties arises out of a lease, dated October 13, 1954, entered into between the defendant and the owners of the Middlesex Shopping Center (hereafter called Middlesex). Middlesex occupies a portion of the triangular area in Baltimore City bounded by Eastern Boulevard, Essex Avenue and Marlyn Avenue. The lease required the owners of Middlesex to construct a gasoline service station for defendant, and, *inter alia*, contained the covenant, designated as Article 1A:

> "Lessor [Middlesex] covenants and agrees that, throughout the term of this lease or any extension thereof, Lessor will not use or permit the use of ~~other~~ property belonging to, acquired, or controlled by Lessor or Lessor's principal stockholders, and situated in the area bounded by Eastern Boulevard, Essex Avenue, and Marlyn Avenue, for the purpose of a gasoline service station, or similar enterprise, which would compete with the business of Shell being conducted on the premises."

Defendant's service station was constructed pursuant to the lease and opened for business in 1954.

The lease was promptly recorded among the Land Records of Baltimore County. Under date of July 23, 1956, plaintiffs acquired a long-term lease on a parcel of property fronting on Eastern Boulevard and immediately adjacent to Middlesex for the purpose of maintaining and operating another competing gasoline service station. Plaintiffs' service station was opened for business on August 31, 1956. Plaintiffs' station was constructed by the principals of Middlesex pursuant to an alleged oral agreement in regard to a right-of-way in such manner that the patrons of Middlesex, and particularly those motorists who parked in the parking area which was a part of Middlesex, could enter plaintiffs' station without the necessity of driving from the parking area to Eastern Boulevard, and from Eastern Boulevard to plaintiffs' station. Conversely, patrons of plaintiffs' station could also leave plaintiffs' station by driving onto the Middlesex area without the necessity of first driving onto Eastern Boulevard.

After plaintiffs' station had begun operations, defendant, under date of October 19, 1956, wrote to the owners of Middlesex stating that defendant was aware that "* * * certain of your lands are being used for entrance into a service station built and owned by another oil company," and that "* * * such use is violative of the restrictive covenant of Article 1A of the lease with us", and, further, that "* * * we trust you will immediately explore this matter with your attorneys and initiate such action as they suggest will leave you in full conformance with the legal and moral obligations which you have assumed."

Promptly after receipt of this letter, the owners of Middlesex erected a barrier between the parking area of Middlesex and the rear entrance of plaintiffs' station. The original barrier, constructed of individual wooden posts, was removed by plaintiffs' employees almost as rapidly as it was erected. Later, a concrete barrier, in the nature of curbing, was erected and, apparently after some question

as to whether the curbing had been placed along the common line or upon plaintiffs' lands, a second concrete curbing was put in place.

Plaintiffs allege that the presence of these three barriers effectively prevented the movement of automobiles between the parking area of Middlesex and the contiguous area of plaintiffs' station, other than via Eastern Boulevard and that plaintiffs' sales of gasoline and related products sharply diminished.

In the first count of the complaint, plaintiffs allege that they and defendant are engaged in price competition and that defendant "* * * commenced and continued a series of concerted actions carried out through oral communications and correspondence addressed to the operators of Middlesex Shopping Center and others, which concerted action was designed to prevent the use of the subject right-of-way by the customers and patrons of the Middlesex Shopping Center over the land of the plaintiffs" (§18). Further, plaintiffs allege that the lease between defendant and Middlesex "* * * contained an unreasonable restraint of trade" by the inclusion of the restrictive covenant set forth above, and that defendant "* * * allegedly purporting to rely upon said inapplicable and unreasonable restrictive covenant, but in fact seeking to destroy Plaintiffs and eliminate price competition offered to Shell by Plaintiffs" (§19) procured the operators of Middlesex to erect barriers along the common line and has in fact destroyed price competition between the defendant and the plaintiffs in the sale of gasoline and petroleum products (§20). Specifically, plaintiffs allege that the foregoing constitute a conspiracy between defendant and owners of Middlesex to restrain plaintiffs' trade and commerce (§21).

In count 2, plaintiffs repeat all of the allegations contained in count 1, and make the further allegation that the "wrongful and unlawful" acts of the defendant maliciously, illegally and unlawfully interferred with the advantageous relationships and contractual rights of the plaintiffs, in violation of the common law of the State of Maryland.

In its motion for summary judgment, or, in the alternative, to dismiss the complaint, defendant maintains that the obtention of the restrictive covenant was not in violation of the Sherman Act, nor was its enforcement, that the restrictive covenant was valid under Maryland law, and that, in any event, plaintiffs' cause of action, if any, is barred by the federal antitrust statute of limitations, contained in Section 5(b) of the Clayton Act, 15 U.S.C.A. §15(b) as to count 1, and the statute of limitations contained in Section 1 of Article 57 of the Annotated Code of Maryland as to count 2. In making these contentions, defendant asserts that no case has held that a restrictive covenant of the type set forth above violates the Sherman Act, that the restrictive covenant from which the dispute arises is not a covenant which was obtained "in interstate commerce," and the effect of the covenant on interstate commerce is not sufficiently substantial to bring the federal antitrust statutes into play. Additionally, defendant contends that the validity and enforceability of the restrictive covenant is well-settled by the Maryland law. The Court has before it, on which to decide the motion, the complaint, the deposition of Mr. H. S. Eustis, Baltimore Division Manager of defendant, taken by plaintiffs on December 6, 1961, the deposition of Mr. Harry Waller, president of plaintiffs, taken by defendant on the same day, and an affidavit of Mr Harry Waller filed under the circumstances later described.

On February 2, 1962, when the motion came on for hearing, counsel for plaintiffs filed with the Court an affidavit made by one of them, purporting to indicate, in accordance with the provisions of Rule 56(f), why plaintiffs were unable to show that there existed a genuine issue as to a material fact at that time, and asking that summary judgment be denied in order to enable plaintiffs to institute discovery proceedings by way of interrogatories, further depositions and admissions of fact, before the Court would consider the motion on its merits. This affidavit was substantially a redraft of an affidavit supporting a motion which had been presented to the Court in chambers on December 28, 1961, praying an indefinite continuance of the hearing on the motion.

The motion presented in chambers was denied, on the ground that an affidavit in compliance with Rule 56(f) was the proper procedure by which the continuance should be requested. Inasmuch as plaintiffs had had ample opportunity, since December 2, 1961, the date on which the first depositions were taken, to initiate interrogatories and further discovery and, since the failure of the plaintiffs to take such steps could only be explained by counsel at the time of the hearing on the ground that interrogatories could not be framed until "private discovery" by way of private investigators was completed — an explanation which could not be accepted by the Court — the affidavit was rejected as lacking in bona fides and made solely for the purpose of delay, and the motion for summary judgment argued and submitted. Subsequent to the hearing, plaintiffs served interrogatories upon defendant and filed with the Court the affidavit of Mr. Waller. The interrogatories came too late to demonstrate plaintiffs' bona fides in seeking to postpone decision of the motion. Accordingly, the Court extended the time for defendant to answer plaintiffs' interrogatories until the motion for summary judgment is decided. Rule 56(c) fixes the date before the hearing as the last day on which opposing affidavits may be filed, and indicates that in the usual case the motion must be decided on the record as of the date of the hearing on the motion. However, paragraph (c) of the Rule provides that, "The Court may permit affidavits to be supplemented or opposed by depositions or by further affidavits." Although leave has not been requested, the Court has permitted the Waller affidavit to be filed and has considered it in deciding the motion.

At the outset, the Court is cognizant of the statement in *McElhenney Co. v. Western Auto Supply Co.*, 269 F. 2d 332, 339 (4 Cir. 1959) that, "* * * the trend of the courts [is] not to dispose finally of antitrust litigation upon the pleadings, without giving the plaintiff full opportunity to formulate his charges," citing *Radovich v. National Football League*, 352 U.S. 445 (1957). In a case decided since the argument of the motion, *Poller v. Columbia Broadcasting System, Inc.*, U.S. (No. 45, October Term, 1961, de-

cided February 19, 1962), the Supreme Court said, "* * * summary procedures should be used sparingly in complex antitrust litigation where motive and intent place leading roles, the proof is largely in the hands of the alleged conspirators, and hostile witnesses thicken the plot." But, as the dissenters in the *Poller* case point out, Rule 56, by its terms, has equal application to all civil litigation and contains no exception for the sometimes vexatious and time consuming private antitrust cases. Since the Court has determined that unquestionably there is no genuine issue as to any material fact and defendant is entitled to judgment as a matter of law, *Minnesota Mining & Mfg. Co. v. United States Rubber Co.*, 279 F. 2d 409 (4 Cir. 1960), this would seem to be an appropriate case for even a sparing use of summary procedure.

Consistent with the pronouncements in *Mandeville Farms v. Sugar Co.*, 334 U.S. 219, 234-235 (1948); *Klor's v. Broadway-Hale Stores*, 359 U.S. 207, 211 (1959); and *Radiant Burners v. Peoples Gas Co.*, 364 U.S. 656 (1961), the problem before the Court, in determining the application of the Sherman Act, is not solely the mechanical one of whether the alleged restraint occurs in interstate commerce or in intrastate commerce. That determination is but a preliminary step. Equally significant is the broader question, whether a substantial effect upon interstate commerce can be found in the sum of the facts presented, because the current cases are clear that a restraint prohibited by the Act, and the injuries the restraint inflicts, are none the less remediable under the Act if the restraint arises in intrastate commerce but has a substantial effect on interstate commerce adverse to the policy of free competition which the Act is designed to safeguard. Cf. *United States v. Yellow Cab Co.*, 332 U.S. 218 (1947).

Plaintiffs own and operate 8 service stations in the State of Maryland, having annual sales in excess of $1,500,000.00 in dollar volume and 6,000,000 gallons in liquid volume, a monthly average of $123,333.00 and 500,000 gallons. Sales at the station adjacent to Middlesex yearly approximate $75,000.00 in dollar volume and 300,000 gallons in liquid

volume, a monthly average of $6,250.00 and 25,000 gallons. These statistics must be viewed against the overall State of Maryland figures of 2,500 to 2,700 service stations selling between 70,000,000 and 90,000,000 gallons of gasoline per month. The station adjacent to Middlesex began business by selling gasoline at the rate of 29,000-30,000 gallons per month, but after the first barrier was erected, volume sales dropped to 15,000-20,000 gallons per month. Each year for the last five years the station has lost approximately $20,000.00. This loss includes the $1,000.00 per month rent plaintiff, A. & H. Transportation, Inc., pays to plaintiff, Savon Gas Stations No. 6, Inc., which leases the same from the owner at $750.00 per month and the taxes which A. & H. also pays on the property.

Plaintiffs acquire their gasoline locally. It is bought by plaintiff, A. & H. Transportation, Inc., or by Mr. Harry Waller, president of plaintiffs, trading as Arrow Oil Company, at terminals in the Metropolitan Baltimore area, and these terminals acquire the gasoline and other petroleum products from out of state sources. Delivery of the gasoline from the terminals to the station adjacent to Middlesex is effected by plaintiffs' trucks, leased trucks, private carrier or contract carrier. Plaintiffs buy directly from out of state sources various items of service station equipment, cans in which motor oil products are sold, motor oil and antifreeze. These latter items are shipped to the station in interstate commerce. While there are certain interstate aspects in the acquisition of the products plaintiffs sell, and the equipment to make sales and render services at retail, the decided cases indicate that the retail sale of gasoline, and related products, is intrastate in character. See *Mitchell v. Livingston & Thebaut Oil Company*, 256 F. 2d 757 (5 Cir. 1958); *Brenner v. Texas Company*, 140 F. S. 240 (D.C., N.D., Cal. 1956); *Dial v. Hi Lewis Oil Co.*, 99 F. S. 118 (D.C., W.D., Mo. 1951); *Myers v. Shell Oil Co.*, 96 F. S. 670 (D.C., S.D., Cal. 1951); *Spencer v. Sun Oil Co.*, 94 F. S. 408 (D.C., Conn. 1950); *Brosious v. Pepsi-Cola Co.*, 155 F. 2d 99 (3 Cir. 1946); *Lewis v. Shell Oil Co.*, 50 F. S. 547 (D.C., N.D., Ill. 1943).

While plaintiffs have alleged that defendant is an international, multi-corporate producer, refiner and marketer of gasoline and petroleum products, the incidence and substantiality of the alleged restraint are the matters for determination, not the corporate activities of defendant. Plaintiffs have variously accused defendant of thwarting "price competition" and unreasonably "restraining plaintiffs' trade and commerce," but the complaint makes it clear that plaintiffs have sole reference to Article 1A and its enforcement. Plaintiffs own and operate seven other service stations in Maryland, but the complaint fails to make a single allegation against defendant in regard to them.

Article 1A is completely local in effect. It relates solely to the three block area comprising Middlesex and is limited in time to the term of the defendant's lease. Its effect is not to prevent plaintiffs from operating their adjacent service station (there is free and complete access to Eastern Boulevard), but simply to deny their customers access to adjoining private property in accordance with the alleged oral right-of-way agreement. The limitation on plaintiffs' right to use adjoining private property was constructively known to them when they acquired the site for their station and entered into the alleged oral right-of-way, Annotated Code of Maryland, Art. 21, §§1, 10; *Irrey v. Karr*, 182 Md. 463 (1943), and plaintiffs elected to establish a service station, and thus to penetrate a marketing area, where, within a three block radius of the site they selected, there are at least ten other service stations, some of which were in existence prior to the Savon station, selling virtually every well-known brand of gasoline marketed in this area, including Esso, Socony-Mobile, Tidewater, Sun, Crown, Texaco, Atlantic and Sinclair, as well as Savon and Shell. Restrictive covenants like Article 1A are part of the familiar pattern of shopping center financing, as disclosed by the cases cited in part II hereof, where they are an inducement to attract the prime tenants required by professional lenders. In this case, the restrictive covenant is too limited in geographical scope to be vulnerable to

attack under any authority which has been called to my attention.

Far from substantial, the effect of Article 1A and its enforcement on interstate commerce is incidental and inconsequential; hence, the jurisdictional requirements of the Sherman Act are not met.

II.

There can be little question but that defendant's motion for summary judgment must be granted as to the second count of the complaint.

As before stated, that count seeks to recover damage and injunctive relief under Maryland law. The Maryland cases have carefully considered restrictive covenants like that contained in Article 1A of the lease and have upheld their validity, irrespective of the motive and purpose of their enforcement.

In the early case of *Guerand v. Dandelet*, 32 Md. 561 (1870), injunctive relief was granted to prohibit the breaching of an agreement ancillary to a lease, wherein the lessor covenanted not to compete, directly or indirectly, with the lessee's dyeing establishment within the City of Baltimore, on the ground that a partial restraint of trade is enforceable if its scope is confined within the reasonable limits, even though its duration may be unlimited. *Griffin v. Guy*, 172 Md. 510 (1937), sustained the enforceability of a covenant contained in an employment contract that the employee would not compete within the Town of LaPlata and, thus, held the restraint reasonable in geographical scope, although indefinite in time.

Snavely v. Brown, 143 Md. 75 (1923); *Slice v. Carozza Prop., Inc.*, 215 Md. 357 (1958) and *Glen Burnie Plaza v. Schreiber*, 220 Md. 303 (1959) likewise uphold similar restrictive covenants. See also, *Schmidt v. Hershey*, 154 Md. 302 (1928); *Belvedere Hotel Co. v. Williams*, 137 Md. 665 (1921); Annotations 90 A.L.R. 1449 (1934), 46 A.L.R. 2d 119, 198, *et seq.* (1956). The latest case, *Md. Trust Co. v. Tulip Realty*, 220 Md. 339 (1959), was one which would

markedly impress itself on the owners of Middlesex, because the principals of Woodmoor Shopping Center enjoined from a breach of the covenant giving the exclusive rights to conduct the only food market in a portion of the center, and the right to use certain parcels as parking areas in common with tenants of other stores in all of the Center, were the same persons who are the owners of Middlesex.

Article 1A is, by its terms, limited in time to the duration of the defendant's lease, a period shorter than the maximum valid under Maryland. In geographical scope, it is considerably more limited than the restrictive covenants upheld in the *Guerand* and *Griffin* cases, *supra*. In the *Tulip case* (p. 412) the law is made clear that the avowed motive and purpose of the parties seeking to enforce the restrictive covenant is immaterial, so that plaintiffs' argument that *Tulip* is inapplicable because Middlesex "was an unwilling party to defendant's economic dominance" is without merit. Article 1A, moreover, is broad enough to restrict Middlesex from using or *permitting* the use of other portions of the center by others in competition with defendant, a prohibition unquestionably valid under *Snavely*, *Slice* and *Tulip*, *supra*.

III.

From what has been said, it is unnecessary to pass upon defendant's contention that both counts are barred by limitations, but defendant would not be entitled to summary judgment because all of the material facts are not beyond issue.

Suit was filed October 27, 1961. The evidence as to the erection of the barriers is contained in Mr. Waller's deposition. There were three barriers, the first consisting of wooden stakes or poles, erected in "late 1956," but removed by plaintiffs' employees as fast as they went up. There followed a concrete curbing, variously stated by Mr. Waller, president of plaintiffs, as put in place in February, 1957, or late 1957, but he wasn't sure. A second concrete curbing was installed in December, 1959 (according to the Waller deposition), or September, 1959 (according to the Waller

affidavit), because Mr. Waller was informed by Middlesex's contractor that the first concrete curbing (the second barrier) was on plaintiffs' land, rather than the common line. What hiatus, if any, there was between the various barriers is not disclosed. Needless to repeat, precise dates cannot be determined, and were limitations the sole basis for the motion, it would be denied and the case set for the receipt of evidence.

Counsel for defendant may submit an order granting summary judgment for defendant with costs, on both counts of the complaint.

HARRISON L. WI[illegible]TER,
United States District Judge.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 683

SAVON GAS STATIONS NUMBER SIX, INC.
and
A. & H. TRANSPORTATION, INC., *Petitioners*

v.

SHELL OIL COMPANY, *Respondent*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF FOR RESPONDENT SHELL OIL COMPANY IN OPPOSITION

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OPINIONS BELOW

The opinion of the District Court (Pet. App. 12a-22a)[1] is reported in 203 F. Supp. 529. The opinion of the Court of Appeals (Pet. App. 3a-11a) is reported in 309 F. 2d 306.

[1] The appendix to the petition is cited as "Pet. App." Petitioners' and respondent's appendices in the Court of Appeals are cited as "Savon App." and "Shell App." respectively.

JURISDICTION

The petition for writ of certiorari was filed on December 21, 1962. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

Respondent, Shell Oil Company (Shell), defendant below, filed a motion with the trial court for summary judgment. In granting this motion, the District Court found that there was no genuine issue as to any material fact and concluded that as a matter of law the undisputed facts disclosed neither (1) an unreasonable restraint of trade on interstate commerce, as required by the Sherman Act, nor (2) a cause of action under the common law of Maryland. The Court of Appeals for the Fourth Circuit unanimously affirmed. The sole question presented here is whether the courts below properly sustained Shell's motion.

STATUTE INVOLVED

The pertinent sections of the Sherman Act (15 U.S.C. § 1, *et seq.*) are reproduced in Appendix A of the petition. (Pet. App. 1a-2a)

STATEMENT

This is a private antitrust action. The complaint, filed October 27, 1961, contains two counts. (Savon App. 1-12) Count I alleges that Shell violated Sections 1 and 2 of the Sherman Act (15 U.S.C. §§1 and 2), by agreeing, combining and conspiring with operators of a shopping center to monopolize and restrain trade in commerce in the retail sale of gasoline and other petroleum products. Count II alleges the same

facts as constituting a violation of the common law of the State of Maryland.

Shell, as defendant below, filed a motion for summary judgment. (Savon App. 10-12) In support of this motion, Shell relied upon the complaint and deposition of Harry Waller, the President, chief executive officer and principal stockholder of each of the petitioners. Petitioners took the deposition of H. S. Eustis, Shell's Baltimore Division Manager, and also filed an opposition affidavit by Waller.

There is no dispute as to the facts. The statement of facts in the petition is in some respects argumentative,[2] but the main fault is that it recites facts which are palpably irrelevant while omitting other facts which are essential for the understanding of the action of the courts below. This statement supplies additional factual information which Shell feels will be helpful to the Court.

This case involves two service stations located on or adjacent to the Middlesex Shopping Center, which is located on the northwest side of Eastern Boulevard, southwest of Essex Avenue in Baltimore County, Maryland. (Savon App. 4) The two stations are about 700 feet apart. (See Sketch, p. 6, *infra.*)

On October 13, 1954, Shell entered into a lease with the Middlesex Shopping Center for a portion of the land located in the Shopping Center. (Savon App. 5) The lease required Middlesex to construct a gasoline station for lessee Shell. One of the covenants of the

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[2] The statement also contains several errors of fact, such as the assertion, thrice repeated, that Shell admitted price fixing. (Pet. 7; also 6, 8) These errors need not be corrected here since they concern matters of no real importance for the disposition of the petition.

lease provides that Shell would have an exclusive right to operate a gasoline station in the Shopping Center. This provision, Article IA of the lease, provides in full:

> "Lessor [Middlesex] covenants and agrees that, throughout the term of this lease or any extension thereof, Lessor will not use or permit the use of other property belonging to, acquired, or controlled by Lessor or Lessor's principal stockholders, and situated in the area bounded by Eastern Boulevard, Essex Avenue, and Marlyn Avenue, for the purpose of a gasoline service station, or similar enterprise, which would compete with the business of Shell being conducted on the premises." (203 F. Supp. at 530; see also Shell App. 5)

A service station for Shell was constructed on the leased premises in 1954. (Savon App. 5) Since then, either Shell or a lessee of Shell has operated and sold Shell gasoline and other petroleum products at this location. (See Savon App. 8-9)

Almost two years after Shell obtained its Middlesex lease, petitioner Savon Gas Station Number Six, Inc., on July 23, 1956, acquired a lease on a piece of property at Eastern Boulevard and Selig Avenue. (Savon App. 4) The full length of this property borders on Eastern Boulevard; and the upper portion of the property is adjacent to and abuts on the parking area of the Middlesex Shopping Center. (Savon App. 4; and see map, Shell App. 9)

Shortly thereafter, petitioners built a Savon gas station on this property, designed in such a fashion as to attract motorists from the parking area of the Shopping Center as well as the public highway, Eastern Boulevard. (Savon App. 6-7) The Savon station was open for business on August 31, 1956. (Savon

App. 7) On October 19, 1956, Shell wrote the following letter, the body of which is quoted in full, to its lessor, the owner of Middlesex Shopping Center:

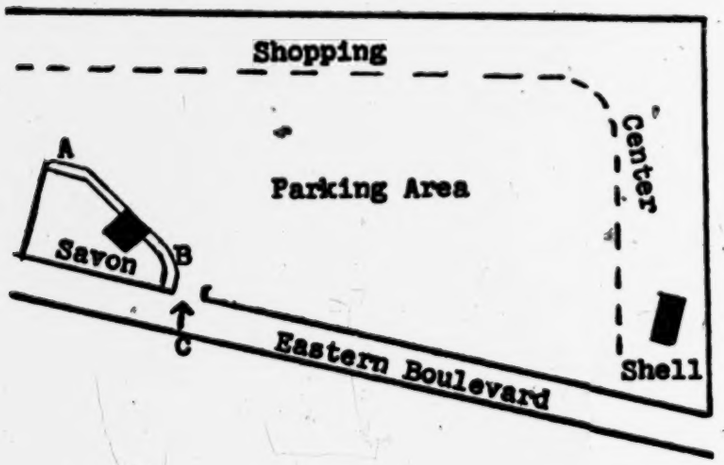
> "Under lease dated October 13, 1954, your predecessor in title and interest, A. G. G. Realty Corp., leased to us certain premises in the Middlesex Shopping Center at Eastern Boulevard and Essex Avenue, Middle River, Maryland. By Article IA of that lease certain restrictions were agreed upon regarding use of other lands in the area for gasoline service station purposes.
>
> "Subsequent thereto, and specifically within the last two months, it has come to our attention that certain of your lands are being used for entrance into a service station built and owned by another oil company.
>
> "It is our impression that willingly permitting such use is violative of the restrictive covenant of Article IA of the lease with us.
>
> "We are sure that it is our mutual desire that this matter be amicably resolved and we trust that you will immediately explore this matter with your attorneys and initiate such action as they suggest will leave you in full conformance with the legal and moral obligations which you have assumed." (Savon App. 66; also 8)

Petitioners stated that the Middlesex Shopping Center, in response to this letter from Shell, erected in 1956 a "barrier" or curb between the parking area of the Shopping Center and the rear area of petitioners' station. (Savon App. 8-9) Petitioners further stated that the barrier prevented automobiles from moving directly between the Shopping Center parking area and the contiguous area at the rear of the Savon station. (*Ibid.*) They acknowledged, however, that motorists at all times were free to and did enter the

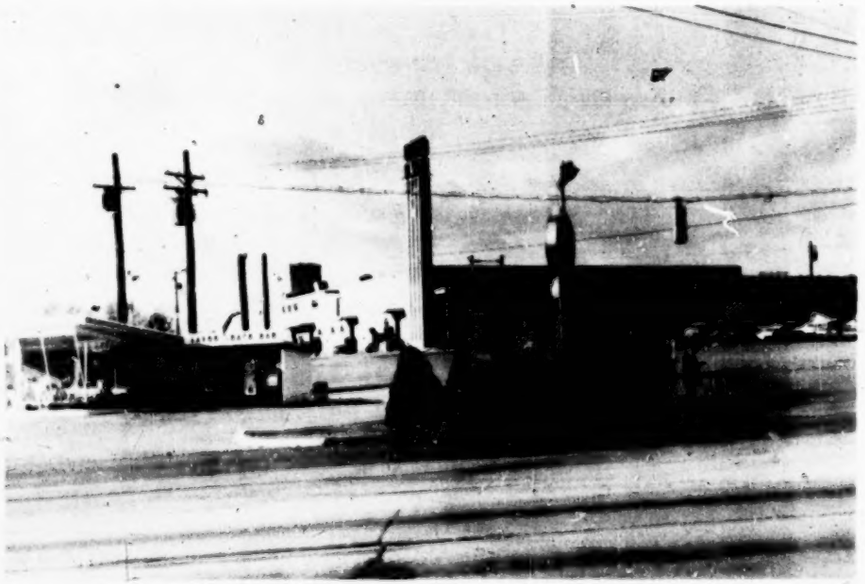
Savon station from the public thoroughfare, Eastern Boulevard. (See Shell App. 7)

Petitioners' whole case is based on the erection of the curb by the Middlesex Shopping Center. There are two basic allegations of the complaint: first, that the exclusive covenant in the Shell lease with the Shopping Center constituted "an unreasonable restraint on trade"; and second, that Shell, in reliance on this covenant, wrote a letter to the Middlesex Shopping Center to which the Shopping Center responded by constructing the curb between its own parking area and the rear area of petitioners' Savon station. (Savon App. 8-9) Relying on these allegations, the complaint charges that Shell violated the Sherman Act and the Maryland common law by restraining and monopolizing the sale of petroleum products in interstate commerce. (Savon App. 1, 9-10)

Because the complaint is based solely on the curb built by the Shopping Center, we set forth below a rough sketch of the Shopping Center showing the location of the Shell and Savon stations.



Defendant's Exhibit No. 5 (Shell App. 11), showing the rear of the Savon station as viewed from the parking area of the Middlesex Shopping Center. This photograph shows the concrete curb that was built by the Middlesex Shopping Center



Defendant's Exhibit No. 2 (Shell App. 10), showing the Savon station and the entrance to the Middlesex Shopping Center as viewed from Eastern Boulevard

It is important to note that petitioners complain only about the curb between the parking area of the Shopping Center and the rear of the Savon station, which is indicated in the sketch by the double lines between A and B. As may be seen from this sketch, motorists using the parking area of the Shopping Center have free access to the Savon gas station through the station driveway located on Eastern Boulevard. The patrons of the Shopping Center need simply drive out of the parking area (see point C on sketch) to enter the Savon station. The ease with which motorists may enter the Savon station driveway may be observed from the sketch above, as well as from the lower photograph (opposite page) of the Shopping Center exit and the Savon station entrance on Eastern Boulevard. In effect, such motorists may be required to travel an extra 50 feet.

The curb merely prevents cars from going directly over the common area between the Shopping Center and the rear of the Savon station. As may be seen from the opposite photographs, the concrete curb is only about six inches high and does not in any way obstruct the view of the Savon station from the parking area of the Shopping Center.

Based on these undisputed facts, the District Court, in a full written opinion (203 F. Supp. 529), granted Shell's motion for summary judgment, holding that as a matter of law the undisputed facts did not disclose either (1) an unreasonable trade restraint on interstate commerce under the Sherman Act or (2) a cause of action under the common law of Maryland. As stated earlier, the Court of Appeals on review unanimously affirmed the action of the District Court.

ARGUMENT

Petitioners submit three reasons as supporting the petition for a writ of certiorari. As the first two reasons, petitioners claim that the opinion below conflicts with decisions of this Court. As a third reason, it is said that the opinion below decided an important question of Federal law. Each of these contentions, as we show below, is without merit.

1. Contrary to petitioners' first contention (Pet. 8-9), the opinion below does not conflict with the standard for deciding motions for summary judgment established by this Court in *Poller* v. *Columbia Broadcasting System, Inc.*, 368 U.S. 464 (1962). In fact, the District Court, in deciding Shell's motion for summary judgment, specifically considered this Court's recent statement in *Poller* that "summary procedures should be used sparingly in complex antitrust litigation where motive and intent play leading roles, the proof is largely in the hands of the alleged conspirators, and hostile witnesses thicken the plot." (*Id.* at 473) As the District Court further pointed out, since it has been determined in this case "that unquestionably there is no genuine issue as to any material fact and defendant is entitled to judgment as a matter of law," this is an "appropriate case for even a sparing use of summary judgment procedure." (Opinion, 203 F. Supp. at 533; Pet. App. 16a-17a)

2. Contrary to petitioners' second contention, the opinion below does not conflict with the seven antitrust decisions of this Court and the two other appellate decisions referred to on pages 10 and 11 of the petition. None of these cases holds that it is improper for a court to grant summary judgment where the undis-

puted facts show, as they most certainly do here, that there is no trade restraint in, or with a substantial effect on, interstate commerce, as required by the Sherman Act.

In the opinions below, both the trial court and the Court of Appeals carefully examined each of the cases put forth by petitioners as applicable to their position. First, the District Court, after making a detailed review of the pertinent facts and a full analysis of the decisional law, decided that the undisputed facts established no trade restraint in, or with a substantial effect on, interstate commerce. Accordingly, the District Court granted the motion for summary judgment because "the jurisdictional requirements of the Sherman Act are not met." (203 F. Supp. at 534; Pet. App. 20a).

On review the Court of Appeals again thoroughly examined the undisputed facts and relevant law, and it, too, agreed "with the conclusion of the District Judge that the restrictive covenant did not involve the violation" of the Sherman Act (309 F. 2d at 309; Pet. App. 8a).

In addition to upholding the lower court's decision, the Court of Appeals noted that "the plaintiffs [petitioners here] have called our attention to authorities in which it is held that transactions in themselves local and intrastate may be within the purview of the statute if they spring from agreements whose enforcement reaches beyond the state." (Pet. App. 8a) Then, taking up each of the cases referred to by petitioners, the Court of Appeals showed why they were wholly inapplicable to the instant appeal. The Court of Appeals concluded:

> "* * * There was no combination to fix prices; no effort to deprive the plaintiff of the necessary supplies for the operation of his business, no interference with his sales of goods to the public, no direct interference with his business in any fashion, and no restraint upon the competitive sale of gasoline in the neighborhood. The single restriction was to deny him direct access from the rear of his property to the parking area of the Shopping Center or, in other words, the right to use the property of the Shopping Center as part of his place of business. The customers of the Shopping Center had free access to the defendant's place of business by using the public street in common with all other members of the traveling public. We do not think that the restriction imposed upon the defendant by the exercise of the right of the Shopping Center to choose the persons who were allowed to do business on its property amounted to an unreasonable restraint of trade within the purview of the Federal Statutes." (309 F. 2d at 310; Pet. App. 9a-10a)

We submit that this decision by the Court of Appeals is correct and does not in any conceivable way involve a conflict with any decisions of this Court.

3. Lastly this case does not, as petitioners argue, involve an important question of Federal law. (Pet. 12-13) Indeed, the validity of the exclusive covenant in the Shell-Middlesex lease is uniquely a question of local law. Such covenants have been repeatedly upheld in the state courts. See *Slice* v. *Carozza Properties, Inc.*, 215 Md. 357, 137 A. 2d 687 (1958) (exclusive covenant in lease to sell alcoholic beverages in shopping center); *Glen Burnie Shopping Plaza* v. *Schreiber*, 220 Md. 303, 152 A. 2d 807 (1959) (exclusive right for food market within shopping center);

Carter v. *Adler*, 138 Cal. App. 2d 63, 291 P. 2d 111 (1955) (exclusive provision for supermarket); *Loblaw, Inc.* v. *Warren Plaza, Inc.*, 163 Ohio St. 581, 127 N.E. 2d 754 (1955) (no other food market within stated radius).

The District Court in its opinion stated: "The Maryland cases have carefully considered restrictive covenants like that contained in Article IA of the [Shell] lease and have upheld their validity, irrespective of the motive and purpose of their enforcement." (203 F. Supp. at 534; Pet. App. 20a) In addition to the Maryland cases cited above, the District Court discussed and referred to still other Maryland decisions: *Guerand* v. *Dandelet*, 32 Md. 561 (1870); *Griffin* v. *Guy*, 172 Md. 510 (1937); *Snavely* v. *Brown*, 143 Md. 75 (1923); *Schmidt* v. *Hershey*, 154 Md. 302 (1928); *Belvedere Hotel Co.* v. *Williams*, 137 Md. 665 (1921) (203 F. Supp. at 534-535; Pet. App. 20a)

The District Court also considered the recent Maryland Court of Appeals case, *Maryland Trust Company* v. *Tulip Realty Company of Maryland*, 220 Md. 399, 153 A. 2d 275 (1959). The factual situation of that case is remarkably similar to this proceeding. In *Tulip*, the Maryland Court of Appeals not only recognized the right of a lessee of a shopping center to have a barrier or fence erected to protect its parking area, but sustained and approved the issuance of a mandatory injunction requiring the shopping center to erect such a fence to protect the interest of one of its lessees. As the District Court stated, the *Tulip* case is one that "would markedly impress itself on the owners of Middlesex, because the principals of Woodmoor Shopping Center [involved in *Tulip*] enjoined from a breach of the covenant giving the exclusive right to conduct

the only food market in a portion of the center, and the right to use certain parcels as parking areas in common with tenants of other stores in all of the Center, were the same persons who are the owners of Middlesex" (203 F. Supp. at 535; see also Pet. App. 20a-21a).[3]

The Court of Appeals agreed "with the District Judge that the restrictive covenant did not violate the common law for the reasons set forth in his opinion." (309 F. 2d at 310; Pet. App. 10a) It also found the *Tulip* case "most pertinent", noting particularly that in that case "the Court of Appeals of Maryland expressly applied the rule that restrictive covenants should be strictly construed but, nevertheless, held that the grant to the tenants of the shopping center of the right to use the parking area for the benefit of itself and its patrons should be interpreted as exclusive so as to forbid the use of the parking area by other persons." (309 F. 2d at 311; Pet. App. 11a).

In sum, this case involves the use of a conventional lease provision and the construction of a curb on private property to protect tenants of a shopping area. Considering the undisputed facts and the settled premises of law, both courts below correctly decided

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[3] The covenant in the Shell-Middlesex lease is, as the District Court found, plainly reasonable, both as to time and geographical area.

> "Article 1A is, by its terms, limited in time to the duration of the defendant's lease, a period shorter than the maximum valid under Maryland law. In geographical scope, it is considerably more limited than the restrictive covenants upheld in the *Gourand* and *Griffin* cases; supra. (203 F. Supp. at 535; see also Pet. App. 21a)

The Court of Appeals agreed that the covenant was "reasonably limited in time and space". (309 F. 2d at 311; Pet. App. 10a)

that there was no conceivable basis for a cause of action either under the Sherman Act or the common law of Maryland.

CONCLUSION

The decision below is correct and there is no conflict of decisions. No important question of law is presented calling for review by this Court. The petition for writ of certiorari should be denied.

Respectfully submitted,

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